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SURROGATE GESTATION AND THE PROTECTION OF CHOICE

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I. INTRODUCTION

The contract is a lengthy one, intended to resolve all potential disputes between the parties; substantial legal research and negotiation preceded its drafting. Detailed requirements explicitly set out the manner in which the agreement must be performed, while other clauses provide for insurance coverage to guarantee the payment of the contract price should the party to receive performance predecease the contract's completion. The party to receive performance also agrees to assume responsibility for the contract's subject matter regardless of its quality. Indeed, this contract might be any complex commercial negotiation except that it is one for surrogate gestation, and the subject matter to be conveyed is a child.

In a surrogate gestation contract, persons unable to conceive children contract with a woman capable of conception.[1] The parties agree that the surrogate gestator will be artificially inseminated,[2] will carry the resulting pregnancy to term,

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The research of Suzanne Fong, second year law student, University of Kentucky, and the editorial suggestions of Ann K. Benfield and Jane Beasley, second year law students, University of Kentucky, in the preparation of this article deserve special recognition.

1. Estimates indicate that one out of every five married couples is infertile. Sixty percent of those cases are due to female infertility. Taylor-Fleming, *New Frontiers in Conception*, N.Y. Times, July 20, 1980 (Magazine), at 20. *See generally*, S.J. KLEEGMAN AND S.A. KAUFMAN, INFERTILITY IN WOMEN (1966) (discussing the causes of infertility in women).

2. In all publicized contracts, the surrogate has been artificially inseminated by the prospective adoptive father. The contract has provided for the transfer of the child to this biological father and his spouse. Brief for Plaintiff at 2, Commonwealth v. Surrogate Parenting Assocs., No. 81-CI-0121 (Ken., Franklin Cir. Ct. Div. I, filed Jan. 27, 1981) [hereinafter cited as Surrogate Parenting Brief]; Letter from Katie M. Brophy, founder of Surrogate Parenting Associates to Louise Graham (April 29, 1980) (on file in the author's office) [hereinafter cited as Brophy]. Surrogate gestation need

and then will terminate her parental rights in order to permit adoption of the child by those persons who contracted for her services. Because surrogate gestation contracts are perceived as having questionable legality, some participants are reluctant to reveal their identities. Some instances of surrogate gestation, however, have resulted in widespread publicity. The best known contracts involve adoptive parents and surrogate gestators matched by physicians and attorneys.[3]

Statements from participants indicate that although personal motivations for entering into the arrangement vary, prospective adoptive parents often are impelled, not only by their disappointment with the lengthy adoption process, but also by a particular desire to have a child who is biologically related to its father.[4] One surrogate provider service reports that it

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not, however, be limited to artificial insemination by the husband in a married couple seeking an alternative means of conceiving a child. There is some evidence that a growing number of single women are using artificial insemination; surrogate gestation might be subject to similar demands. Taylor-Fleming, *supra* note 1.

3. Two such providers of surrogate services are Surrogate Parenting Associates of Louisville, Kentucky and Michigan attorney Noel Keane. Surrogate Parenting Associates was formed by Katie M. Brophy and Dr. Richard Levin. Levin and Brophy located their first surrogate gestator through an advertisement in a Louisville newspaper. Levin now uses computers to match clients and potential surrogates. Keane has coordinated a number of surrogate transactions. Currently he is challenging Michigan adoption laws preventing payment for those transactions. Taylor-Fleming, *supra* note 1, at 22; Both services have received national media attention. *Pregnancy by Proxy*, Newsweek, July 7, 1980, at 72 [hereinafter cited as *Proxy*]. Physicians have historically exercised substantial control over the selection of artificial insemination donors and recipients. W. FINEGOLD, ARTIFICIAL INSEMINATION 5-8 (1976). At one time physicians required that the husband select the donor in order to avoid liability for poor selection. That procedure was abandoned because of fear that a relationship might develop between a donor and the inseminated wife. *Id.* A recent study indicates that sixty-two percent of current donors are medical students. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L. Q. 1, 6 (1980). Since artificial insemination requires only standard hospital consent forms, attorneys have not been extensively involved in form preparation. The entrance of attorneys into the field is a result of the need to control, not only the doctor-patient relationship, but that of contract participants. Attorneys who have entered the field have aided both in contract drafting and in establishing surrogate-adoptive parent relationships. Taylor-Fleming, *supra* note 1, at 22. An attorney who advertises for a surrogate gestator to further the interests of clients unable to bear children has not necessarily advertised his or her legal services. Placing the client's advertisement should be distinguished from those cases in which an attorney offers to represent parties interested in surrogate gestation. Such advertisements could pose interpretive problems under Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

4. The time lapse between application and initiation of the adoption procedure can be as long as six years when the adoptive parents desire an infant. L. WISHARD & W.R. WISHARD, ADOPTION: THE GRAFTED TREE 48 (1979) [hereinafter cited as WISHARD]. Additionally, most states require a six month to one year waiting period

accepts only married couples as prospective adoptive parents and uses as surrogates only married women who have already born children.[5] Such limitations may be designed to bolster the image of surrogate gestation as an acceptable practice. First, married couples provide the traditionally preferred two-parent families;[6] and second, the use of married mothers as surrogates avoids the stigma of inducing unwed women to become mothers as well as ensures that the surrogates have past experience with their task.[7]

Once the would-be parents decide to enter into a surrogate gestation contract, they are matched with a surrogate who, like them, has undergone extensive psychological[8] and physical testing. For example, surrogates and prospective adoptive parents matched by provider services are routinely checked for genetic compatibility, including the ability of the surrogate to provide traits desired by the parents-to-be.[9] The

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before the adoption becomes final. M.I. LEVY & R.D. WIENBERG, LAW OF ADOPTION 51-63 (4th ed. 1979). Surrogate gestation thus offers an alternative to a lengthy procedure. The practice may also offer an alternative to some persons who might not otherwise qualify under agency standards related to age. Many agencies restrict infant adoptions by parents over forty. WISHARD, *supra*, at 46. For some persons, however, the most marked advantage to surrogate gestation is the biological relationship between the father and the child. That relationship may ensure more than a general physical similarity. It also promises intellectual similarity and fulfills a psychological need to be a parent. *Cf.* W. FINEGOLD, *supra* note 3, at 22-23 (The advantages of artificial insemination include avoidance of poor genetic background in adoptable children, similar physical appearance, and satisfaction of women's "craving for carrying with child.").

5. Cassidy, *Brave New Child*, Bluegrass Woman, Oct.-Nov. 1980, at 24.

6. Limitations in surrogate gestation contracts providing that the recipients of the child must be a married couple comport with preferences exercised by most adoption agencies. *See* J. MCNAMARA, THE ADOPTION ADVISOR 21 (1975); WISHARD, *supra* note 4, at 41.

7. Using married mothers as surrogates protects both the surrogate and the physician or attorney who facilitates the surrogate gestation transaction. Providers of surrogate gestation services reason that women with other children will better understand the psychological problems potentially present in surrendering the child. Taylor-Fleming, *supra* note 1, at 24. Experience with the task may also have an effect on the surrogate's assumption of the medical risks inherent in pregnancy.

8. Psychiatric evaluation of all parties is required in the contracts of Surrogate Parenting Associates of Louisville, Kentucky. Brophy, *supra* note 2.

9. One set of prospective parents requested a surrogate whose genetic make-up would, possibly produce a child slightly taller than either parent. Cassidy, *supra* note 5, at 24. At the opposite pole, physicians who facilitate surrogate gestation contracts could also be liable for their failure to detect genetic incompatibility. Outside of the surrogate gestation context such liability is expanding. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (Tay-Sachs disease); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) (Down's syndrome); Becker v. Schwartz, 60

surrogate, represented by her own attorney,[10] then contracts with the prospective adoptive parents, represented by their attorney, that the surrogate will be artificially inseminated with the adoptive parent-husband's sperm, will carry any resulting pregnancy to culmination, and finally terminate her parental rights[11] to permit adoption by the biological father and his spouse.[12]

App. Div. 2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (Down's syndrome). The standard of care applicable to physicians who routinely use genetic screening as a part of surrogate gestation should be higher than that applied to ordinary physicians. Facilitators of surrogate gestation contracts might be found to be genetic counselors and, thus, subject to a higher standard of care. *See generally* Capron, *Tort Liability in Genetic Counseling*, 79 COL. L. REV. 618 (1979); Reilly, *Genetic Counseling and the Law*, 12 HOUS. L. REV. 640 (1975); Walz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U.L. REV. 696 (1973); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

10. Since the interests of the surrogate gestator and those of the adoptive parents may conflict at some point, the same attorney has difficulty representing the prospective adoptive parents and the surrogate. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A)-(C).

11. In the contracts drafted by Surrogate Parenting Associates of Louisville, Kentucky, both the surrogate gestator and her husband contractually agree not to form a parent-child relationship with any child conceived pursuant to the agreement and to terminate their parental rights to such a child. Surrogate Parenting Brief, *supra* note 2, app. at 3. In Kentucky parental rights may not be voluntarily terminated prior to five days after the child's birth. KY. REV. STAT. § 199.601 (1978). At least one other state has a similar waiting period. ILL. ANN. STAT. ch. 40, § 1511 (Smith-Hurd 1980) (No consent or surrender shall be taken within the seventy-two hour period following the birth). The surrogate and her husband also agree to permit the biological father's name to be listed on the birth certificate. *See* KY. REV. STAT. § 213.050 (1972) (providing for the use of a natural father's name on the birth certificate when an affadavit is filed stating that the affiant is the father of the child). Finally the surrogate's husband agrees to undergo paternity testing to rebut any presumption of paternity. *See* KY. REV. STAT. § 406.011 (1972) (husband presumed father of a child born during wedlock). Under the Uniform Parentage Act, the surrogate's husband would be presumed the father of a child conceived during their marriage, but that presumption could be rebutted by clear and convincing evidence. UNIFORM PARENTAGE ACT § 4 (1973). The Uniform Parentage Act does pose some danger that the surrogate's spouse, having consented in writing to an artificial insemination, could be treated as the child's legal father. The act provides that when such consent is given, the consenting husband is treated in law as if he were the child's natural father. *Id.* at § 5. In California, if the surrogate were married and cohabiting with her husband, who is not impotent or sterile at the time of conception, the presumption of paternity would be irrebuttable. CAL. EVID. CODE § 621 (West Supp. 1981). For a discussion of the problems presented by the California rule, see Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 614-16 (1978).

12. The Kentucky agreements state, that the surrogate and her husband will permit adoption of the child by "any party" upon the request of the natural father. Surrogate Parenting Brief, *supra* note 2, app. at 4. In the event of the natural father's

Some contracts delineate for the surrogate special requirements related to medically acceptable behavior on her part during the pregnancy. Usually, she agrees not to smoke, drink, or take medication without written consent of the physician involved.[13] She also agrees to comply with a specific medical examination schedule.[14] Not all contract promises made by the surrogate, however, relate to such routine behavior. In some cases the contract also requires that the surrogate undergo amniocentesis.[15] As to the allocation of risks incident to the transaction, the surrogate gestator and her spouse agree to assume all medical pregnancy risks, while the prospective adoptive parents agree to assume the risk of a defective or abnormal child.[16]

In November 1980 the first child subject to a widely publicized surrogate gestation contract was born in Louisville, Kentucky.[17] The surrogate gestator, who used the pseudonym Elizabeth Kane, and her husband promptly terminated their parental rights to permit adoption by an anonymous married

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death, Dr. Levin, the Surrogate Parenting Associates of Louisville Kentucky founder, may privately place the child for adoption. *Id.* If the child is awarded to the surrogate, her husband, or any individual or organization not related to the natural father, the contract provides that the natural father is entitled to subrogation against the surrogate and her husband for any pregnancy-related expenses or child support and to reimbursement of any consideration already transferred. *Id.*

13. *Id.* at 9.

14. *Id.*

15. *Id.* Amniocentesis is one test available to detect congenital defects in the fetus. In that test a sample of the amniotic fluid surrounding the fetus is removed and tested for chromosomal abnormalities. Amniocentesis does not permit detection of all fetal defects. *See generally* Littelfield, *The Pregnancy at Risk for a Genetic Disorder,* 282 NEW ENGLAND J. OF MED. 627 (1970). For a thorough discussion of the legal problems involved in the use of amniocentesis, see Friedman, *Legal Implications of Amniocentesis,* 123 U. PA. L. REV. 92 (1975).

16. The allocation of these risks between the parties themselves does not necessarily mean that an attending physician would be absolved from liability. *See supra* note 9. Surrogate gestation contracts pose interesting problems for insurers. Surrogate Parenting Associates' contracts state that the biological father agrees to pay all expenses not covered by the surrogate's insurance. Surrogate Parenting Brief, *supra* note 2, app., at 4. If the surrogate is the primary insured under a policy covering pregnancy, an insurer might be required to cover her expenses. If, however, the surrogate is carried on a spouse's policy, the insurer would have a legitimate complaint that it intended to insure only pregnancy in which the spouse was the natural father. Risks of an abnormal birth in a surrogate gestation contract are not necessarily remote. In a recent speech, Dr. Levin affirmed that one child subject to a contract was born with an unstated abnormality. The prospective adoptive parents accepted the child. Brammer, *Lexington Woman To Be Surrogate Mother,* Lexington Leader, March 16, 1981, at A1.

17. Surrogate Parenting Brief, *supra* note 2, app., at 4.

couple.[18] Elizabeth Kane has claimed to be the first paid surrogate gestator in this country.[19] Media reports allege, however, that she is not the first surrogate gestator and that several other surrogate gestation contracts have been completed.[20] Surrogate gestation has burst upon the scene as an accomplished fact with little or no legal fanfare to accompany its own birth. Although Kentucky has belatedly sought to regulate the contracts,[21] little prior attention had been given to the manner of propriety of state regulation.

Proponents of surrogate gestation contracts base their case on both the constitutional privacy rights of persons involved in the contract and the notion that contractual agreements are capable of sufficiently protecting all interests involved. This article first speculates on how courts might handle surrogate gestation contracts under existing laws and offers arguments for and against such contracts. Although some commentary on the contractual aspect of the agreement exists,[22] little attention has been given to the privacy arguments of the parties. The major focus of this article, therefore, is upon the nature of the privacy claims asserted by the prospective parents and the surrogate gestator.[23] Only if the procreational choice of the parties is a protected one do the custody or contract rules become relevant.[24] Consequently,

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18. *Id.*

19. *Id.* In televised interviews Ms. Kane has suggested that the contract price was not the sole motivation for her entrance into the contract. Other reports also indicate that some surrogates are motivated by their desires to aid others rather than by monetary considerations. *Proxy, supra* note 3. A discussion of the problems raised by unpaid gestators is beyond the scope of the present article.

20. *Id.*

21. The Kentucky attorney general's office issued an opinion in early January 1981 stating that the contracts were against the state's public policy of buying and selling children. [1980-81] KY. ATT'Y GEN. OP. 81-18 (Banks-Baldwin) (syllabus). The suit against Surrogate Parenting Associates was filed almost immediately thereafter.

22. Comment, *Contracts to Bear a Child, supra* note 11, at 611.

23. A number of articles have offered explanations for the protection of a right of privacy associated with intimate decisions. *See generally* Gavison, *Privacy and the Limits of Law,* 89 YALE L.J. 421 (1980); Gelfand, *Authority and Autonomy: The State, The Individual and The Family,* 33 U. MIAMI L. REV. 125 (1978); Gerety, *Redefining Privacy,* 12 HAR. C.R.-C.L. L. REV. 233 (1977); Karst, *Intimate Association,* 89 YALE L.J. 624 (1980); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution,* 30 HASTINGS L.J. 957 (1979).

24. Several other reasons militate for this particular focus. In the first place, the use of contractual terms to describe the right to a child is incongruous. Whatever the flexibility of the Uniform Commercial Code, extension of its principles to cover this

this article traces the procreation cases through their historical development to show that although a consistent rationale for protection of women's rights has not been fully developed by the Court, the Court has taken an important step through its protection of choice. In conclusion, the article suggests that protection of choice is, in fact, the basis for the Court's proper role in regulating procreational decisions.

II. SURROGATE GESTATION AND THE CURRENT LAW.

At the present time state legislation directly addressing surrogate gestation does not exist. For that reason, states attempting to regulate surrogate gestation immediately would be forced to do so under existing laws. States might seek to regulate contracts in one of two ways. Initially, a state could attempt prospective prohibition of a contract through application of its adoption laws.[25] Prospective prohibition, however, would not be the sole avenue through which a state might proceed. Even those states that did not attempt to regulate surrogate gestation initially might exercise a regulatory impact upon the contracts through resolution of contract or custody disputes.

Some providers of surrogate gestation services indicate that they have contacted prospective surrogates through newspaper advertisements. States could seek to apply prohibitions against advertising children for adoption to surrogate gestation contracts.[26] Restriction of advertisement, however, is

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situation is unwarranted. Likewise, general custody principles fail to provide a dispositive solution to the initial question of the contract's legality. Second, focusing initially upon contract or custody solutions puts the cart before the horse. The use of such principles to resolve the hard questions involved is necessary only if a state cannot constitutionally prohibit the contracts in the first instance. Finally, any constitutional protection which the contract enjoys may have an effect upon the manner in which contract custody disputes must be resolved. *See* text accompanying notes 120-42, *infra*.

25. Regulation through adoption laws is possible because the wife in the transferee couple is not legally related to the child. In most cases, therefore, termination of the surrogate gestator's parental rights and adoption by the transferee wife are a minimum necessary to legally transfer the child under any contract. In addition, some persons might wish to guard against later problems with paternity by terminating the surrogate gestator's husband's parental rights and providing for adoption by the biological father. The latter practice would avoid problems with presumptions regarding paternity. *See supra* note 11.

26. Many states have a statutory prohibition against the advertisement of children for adoption. *See, e.g.*, ALA. CODE § 26-10-8 (1931); CAL. CIV. CODE § 224p (West Supp. 1981); GA. CODE § 74-418 (1981); KAN. STAT. § 65-609 (1919); KY. REV. STAT. §

impermissible if the underlying activity is constitutionally protected[27] and is of little significance in deterring such contracts in any case. A number of states severely restrict permissible payments in connection with adoption[28] or require disclosure or approval of all fees paid.[29] Because the transfer of a child under a surrogate gestation contract is assumed to require adoption by the woman not the biological mother, these adoption regulations could be imposed upon a surrogate gestation contract to prevent payment of any fees over the surrogate gestator's expenses.[30] Finally, some states require social

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199.590 (Baldwin 1980); NEV. REV. STAT. § 127.310 (1980); N.H. REV. STAT. ANN. § 170-E: 14 (1978); N.C. GEN. STAT. § 48-38 (1976); OHIO REV. CODE § 103-17 (1970); WASH. REV. CODE ANN. § 26.36.040 (1979).

27. Restrictions on the advertisement of contraceptives have been struck down by the Supreme Court. Carey v. Population Serv. Int., 431 U.S. 678 (1977).

28. *See* ARIZ. REV. STAT. § 8-126 (1974) (prohibits fees except to licensed agencies); COLO. REV. STAT. § 19-4-115 (1973) (prohibits fees except for attorney fees and those approved by court); DEL. CODE ANN. tit. 13, § 928(b) (Supp. 1980) (fees limited to attorney fees, court costs, and actual placement costs of agencies); D.C. CODE ENCYCL. § 32-790 (West Supp. 1970) (limits fees except for costs to charitable organizations); FLA. STAT. ANN. § 63.212 (West Supp. 1981) (only licensed agencies may charge fee; any fee over $500 must be disclosed); ILL. ANN. STAT. ch. 40, § 1701 (Smith-Hurd 1980) (prohibits fees except for those charged by licensed agency); KY. REV. STAT. ANN. § 199.590 (Baldwin 1980) (prohibits fees except for those charged by licensed agency); ME. REV. STAT. ANN. tit. 22, § 8204 (1980) (limits fees to reasonable costs of services); MD. ANN. CODE art. 16, § 83 (1981) (fees limited to costs); MICH. COMP. LAWS ANN. § 710.54 (Supp. 1980) (MICH. STAT. ANN. § 278.3178 (555.54) (Callaghan 1980)) (limits fees to those approved by court); NEV. REV. STAT. § 127.290 (1980) (compensation permitted for operating costs only for licensed child placement agency); N.J. REV. STAT. ANN. § 9:3-54 (West Supp. 1981) (prohibits payment of fee except to approved adoption agency); N.Y. Soc. SERV. LAW § 374(6) (McKinney 1980) (only authorized agency may charge fees); N.C. GEN. STAT. § 48.37 (1976) (forbids anyone but licensed child placement agency from receiving payment); TENN. CODE ANN. § 36-136 (Supp. 1980) (prohibits payment of fees except to licensed agency); UTAH CODE ANN. § 55-8a-1 (1974) (forbids compensation except to licensed agency).

29. *See* ARIZ. REV. STAT. ANN. § 8-109 (Supp. 1981) (all cases); ARK. STAT. ANN. § 56-211(a) (Supp. 1971) (exception for step-parent adoption); CAL. CIV. CODE § 224r (West Supp. 1981) (exception for step-parent adoption); COLO. REV. STAT. § 19-4-110(4) (1973) (all cases); DEL. CODE ANN. tit. 13, § 928(b) (Supp. 1980) (all cases); FLA. STAT. ANN. § 63.132 (West Supp. 1981) (exception for step-parent adoption); GA. CODE ANN. § 74-407(b) (Supp. 1980) (exception for step-parent adoption); ILL. ANN. STAT. ch. 40, § 1517 (Smith-Hurd Supp. 1980) (exception for step-parent adoption); IOWA CODE ANN. § 600.9 (West Supp. 1980) (exception for step-parent adoption); MICH. COMP. LAWS ANN. § 710.54 (Supp. 1980) MICH. STAT. ANN. § 273178 (555.54) (all cases); N.J. REV. STAT. ANN. § 9:3-55 (West Supp. 1981) (exception for step-parent adoption); N.D. CENT. CODE § 14-15-10 (1971) (exception for step-parent adoption); 23 PA. CONS. STAT. ANN. § 2531 (Purdon Supp. 1981) (exception for brothers, sisters, niece, or nephew adoption).

30. The rule in many states exempting step-parent adoptions from any disclosure requirement could make the implementation of such a prohibition difficult.

service agency approval of many adoptions[31] and licensing of all child-placing agencies.[32] Agency disapproval of contracts or a refusal to license facilitator services would have a regulatory impact.

The initial attempts to regulate surrogate gestation have been of the prospective variety. In early 1980, a Michigan couple interested in entering into a surrogate gestation contract sought a declaratory judgment that Michigan adoption laws, which prohibit the exchange of money, other consideration, or thing of value in connection with adoption, are unconstitutionally vague as well as violative of a constitutional right of privacy. In *Doe v. Kelley*,[33] the Michigan trial court dismissed the vagueness attack because of its view that "other consideration or thing of value" gave notice to reasonably intelligent persons of what things cannot be exchanged in connection with adoption. The court also held that the statute did not violate the plaintiffs' personal privacy rights.[34] The court characterized the plaintiffs' asserted right as the right to pay money for the adoption of a child. Thus labeled, the right was not one of the same personal nature normally associated with the right of privacy. The court, however, went on to state that even if the plaintiffs' rights fell within the zone of privacy, the state's interest in preventing commercialism from affecting a decision to conceive a child was sufficiently com-

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31. Many states do not require investigation in a step-parent adoption. *See* ALA. CODE § 26-10-2 (1975); ALASKA STAT. § 20.15.100(g) (Cum. Supp. 1980); ARIZ. REV. STAT. ANN. § 8-105(n) (Supp. 1980); ARK. STAT. ANN. § 56-212(c) (Supp. 1981); COLO. REV. STAT. § 19-4-111 (1973); CONN. GEN. STAT. ANN. § 45-63(a) (West Supp. 1981); D.C. CODE ENCYCL. § 16-308 (West Supp. 1980); FLA. STAT. ANN. § 63.092 (West Supp. 1981) (within court's discretion); GA. CODE ANN. § 74-409 (1980); IDAHO CODE § 16-1506 (Supp. 1981); ILL. ANN. STAT. ch. 40, § 1508 (Smith-Hurd 1980); IOWA CODE ANN. § 600.8(f) (West Supp. 1981); KAN. STAT. ANN. § 59-2278 (1976); MASS. ANN. LAWS ch. 210, § 5A (Michie/Law Co-op 1981); MISS. CODE ANN. § 93-17-11 (1973) (discretion of court); MO. REV. STAT. § 453-0708 (1977); MONT. REV. CODES ANN. § 40-8-123 (1979) (court discretion); NEV. REV. STAT. § 127.120 (1979); N.J. STAT. ANN. § 9:3-48(2) (West Supp. 1981); N.M. STAT. ANN. § 40-7-12 (1978) (court discretion); N.D. CENT. CODE § 14-15-11(5) (interim Supp. 1979); OKLA. STAT. tit. 10, § 60.13 (West 1971); R.I. GEN. LAWS § 15-7-2 (Supp. 1980); S.D. CODIFIED LAWS ANN. § 25-6-10 (Supp. 1980); TENN. CODE ANN. § 36-118 (Supp. 1980) (court may waive); UTAH CODE ANN. § 78-30-14 (1977).

32. *See, e.g.*, CAL. CIV. CODE § 2249 (West Supp. 1981); FLA. STAT. ANN. § 63.202 (West Supp. 1981); ILL. ANN. STAT. ch. 23, § 2214 (Smith-Hurd Supp. 1980); MICH. COMP. LAWS ANN. § 722.124 (Supp. 1980); MICH. STAT. ANN. § 25.358(24) (1974); N.J. STAT. ANN. § 9.3-40 (West Supp. 1981).

33. 6 FAM. L. REP. (BNA) 3011 (Mich. Cir. Ct. Jan. 28, 1980).

34. *Id.* at 3013.

pelling to permit a state to prohibit payment for a surrogate gestation contract.[35]

In a second instance of attempted state regulation of a surrogate gestation contract, proponents of the contract have defended against the state attorney general's attempt to enjoin them, relying upon a distinction between adoption and termination of parental rights and an exception in the adoption statutes for private, intrafamily adoptions.[36] Kentucky participants argued that their contract provided for the termination of parental rights rather than for adoption and that termination of parental rights cannot be regulated through adoption laws.[37] Drafters of the Kentucky surrogate gestation contracts have also based their claim of legality upon an exception which provides that the state Department of Human Resources need not be consulted in cases of adoption by a step-parent.[38]

Because most known surrogate gestation contracts have been performed rather than breached, no example of regulation through contract or custody resolutions is available. A number of problems arise, however, from any attempt to apply contractual principles to a surrogate gestation dispute. Consider the problem that faces a court should the surrogate gestator decide not to perform the contract. Would a legal system that has never required the personal performance of an opera singer[39] or an athlete[40] require specific performance

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35. *Id.* at 3014.

36. Surrogate Parenting Brief, *supra* note 2, Kentucky's attorney general has sought a declaratory judgment that surrogate gestation contracts contravene the state's public policy against baby selling. The attorney general also alleges that the contracts violate a number of Kentucky statutes. *See* KY. REV. STAT. § 199.500(5) (1980) (consent for adoption may not be given prior to the fifth day after the birth of the child); *Id.* § 199.590(2) (no unlicensed person, agency, or institution may charge a fee nor accept renumeration for placement of a child); *Id.* § 199.601(2) (petition for termination of parental rights may not be filed prior to five days after the birth of the child): *Id.* § 199.990(4) (prescribing penalities for violation of prior sections).

37. Because a valid consent for adoption cannot be given until five days after the child's birth, the drafters of the surrogate gestation contracts have attempted to characterize their contracts as agreements to terminate parental rights. *Id.* § 199.500(5). The termination of parental rights statute states that no petition may be filed during the five day period. *Id.* § 199.601(2). Read literally, it does not prohibit any consent to terminate parental rights, only the petition's filing.

38. *See id.* § 199.470(4)(a) (exempting step-parent adoptions from a general requirement that a child be placed by a licensed agency or with the approval of the Department of Human Resources).

39. *See* Lumley v. Wagner, 42 Eng. Rep. 687, 1 DeGex, MacNaughten &

in this case? Courts might face additional dilemmas should either party breach the contract after the child's birth. Even those attorneys who pioneered surrogate gestation contracts concede that should the surrogate gestator refuse to relinquish the child for adoption, it is improbable that a court would order a transfer based solely on contract principles.[41] Conversely, should the prospective adoptive parents refuse to accept the child, it is unlikely that a court would require them to do so. Viewed simply as contracts, firmly entrenched grounds exist for declaring such agreements unenforceable as against public policy.[42]

In cases in which the contracts themselves were unenforceable, standards applicable to resolution of custody disputes might provide guidance.[43] If a refusal to surrender the child or, alternatively, a refusal to accept the child were treated as a routine custody and support matter, the following results could occur. If the surrogate gestator admitted the child's paternity,[44] but refused to surrender the child, a court might award custody to either the surrogate or to the biological father. The likelihood of either parent prevailing would

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Gordon 604(Ch. App. 1852). Of course, the defendant in *Lumley* was enjoined from appearing elsewhere. Although this rule might operate to permit an injunction against the transfer of the child to third parties, it would not apply to the surrogate's retention of the child. The rule that a contract for distinctly personal, nondelegable services will not be enforced by specific performance is nearly universal. The reasons given for the refusal to enforce are the difficulty of gauging the quality of any performance rendered, prejudice against a species of involuntary servitude, and a reluctance to force a continued relationship between antagonistic parties. 5A A. CORBIN, CONTRACTS § 1204(1951).

40. Houston Oilers v. Neely, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

41. Cassidy, *supra* note 5.

42. RESTATEMENT OF CONTRACTS § 583, Comment a, Illustration 1 (1933) (bargain for custody illegal unless it reflects the child's welfare); *Id.* § 591, Comment a (bargain unduly restricting freedom or jeopardizing life is illegal even if originally entered into voluntarily). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 333, Comment a (1977).

43. The Uniform Marriage and Divorce Act provides the following standards for custody adjudication. The court must determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including the wishes of the child's parents, the wishes of the child, the child's interaction and interrelationship with parents, siblings, and other persons who may significantly affect the child's best interest, the child's adjustment to home, school, and community, and the mental and physical health of all involved individuals. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1973).

44. For a discussion of the problems involved in a determination of paternity, *see supra* note 11.

depend upon the court's assessment of the best interest of the child,[45] including whether the court applied any presumption of maternal preference.[46] The losing parent might be awarded visitation rights.[47] Such awards to unwed fathers are not uncommon.[48] Additionally, either parent might be required to provide support for the child.[49]

III. ARGUMENTS FOR AND AGAINST SURROGATE GESTATION

One argument for surrogate gestation is that such contracts facilitate reproductive freedom for both sexes. Surrogates gestation is seen by some proponents as an analog to artificial insemination.[50] So viewed, a contract for surrogate

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45. The best interest of the child focuses upon a combination of economic, sociological and psychological factors. Often, however, the child's attachment to a psychological parent is the focus of the determination. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973). The application of the standard is rendered less vague by developmental-psychological approaches. Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decision-making*, 12 WILLAMETTE L.J. 491(1976). That approach, however, does not eliminate the problems of prediction inherent in awarding custody of a newborn.

46. Historically, courts applied a tender years presumption that required the award of very young children to a mother who was not found unfit. *See* Roth, *The Tender Years Presumption in Custody Cases*, 15 J. FAM. L. 423 (1976-77). A number of states have statutorily overruled such a presumption. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-332 (1973); CAL. CIV. CODE § 4600 (West Supp. 1979); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1979); KY. REV. STAT. § 403.270 (Supp. 1980); N.Y. DOM. REL. LAW § 240 (McKinney 1976). Other courts have stricken the presumption for public policy reasons or on grounds of unconstitutionality. *In re* Marriage of Winter, 223 N.W.2d 165 (Iowa 1974) (against public policy); Commonwealth *ex. rel* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977); (unconstitutional). *But see* Thompson v. Thompson, 57 Ala. 57, 326 So. 2d 124 (1975) (tender years presumption permissible as a factual presumption); J.B. v. A.B., 242 S.E.2d 248 (W. Va. App. 1978) (continuing to apply the presumption on the ground that it reflects the division of labor in the average family).

47. Generally a parent not granted custody is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. UNIFORM MARRIAGE AND DIVORCE ACT § 407 (1973).

48. An unwed father may be awarded visitation if it is in the best interest of the child. *See, e.g.*, Sullivan v. Bonafonte, 172 Conn. 612, 376 A.2d 69 (1977); Mixon v. Mize, 198 So. 2d 373 (Fla. Dist. Ct. App.), *cert. denied*, 204 So. 2d 211 (Fla. 1967); Phillips v. Herlander, 535 S.W.2d 72 (Ky. 1975); Gardner v. Rothman, 370 Mass. 79, 345 N.E.2d 370 (1976); Pearson v. Clark, 382 So.2d 482 (Miss. 1980); J.M.S. v. H.A., 242 S.E.2d 696 (W. Va. 1978).

49. The Uniform Marriage and Divorce Act provides that the court may order either or both parents owing a duty of support to a child to pay amounts reasonable and necessary for his or her support. UNIFORM MARRIAGE AND DIVORCE ACT § 309 (1973).

50. Some of the rules developed for artificial insemination, however, are them-

gestation raises few objections. Two of the original social objections to artificial insemination—that it amounted to adultery[51] and threatened the marital relationship[52]—have not prevented the widespread use of the technique. Changing social attitudes toward artificial insemination could portend social acceptance for surrogate gestation as well. Indeed, an argument can be made that to deprive a married couple unable to bear children because of the wife's infertility an opportunity to have a child of their own is unfair, when a partnership in which a husband is infertile may have a child through artificial insemination. Other difficulties, however, would have to be balanced against that argument. Removal of social objections by comparison to artificial insemination does not solve all problems raised by the contracts. For example, a third objection to artificial insemination—that it is unclear who is the child's legal father[53]—carries over to surrogate gestation contracts and raises significant obstacles.

The need to allocate the child to one set of legal parents might be satisfied by legislation making the husband of the surrogate the legal father of the child if she breached the agreement by refusing to surrender the child[54] and otherwise nominating the biological father as the legal father. Furthermore, a definition of mother that would render the adoption process unnecessary could be developed. That definition might operate in one of two ways. First, the spouse of the biological father could be defined as the legal mother of the child once conception had occurred. That solution would also require some definition of the surogate's status. The surrogate's rights as the carrier of the child would need to be carefully spelled out in order to protect her. For instance, she might retain the right to terminate the pregnancy but have no rights

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selves potential problems for persons wishing to enter into a surrogate gestation contract. For example, the rule that a child conceived through artificial insemination after a husband's written consent is treated as a child of that husband. *See supra* note 11.

51. Orford v. Orford, 58 D.L.R. 251 (Can. 1921) (artificial insemination involves the "essence" of adultery because it surrenders the wife's reproductive faculties to one not the husband).

52. *See*, W. FINEGOLD, *supra* note 3, at 19-24.

53. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

54. *See generally* Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. LAW 331 (1979-80); Smith, *Through a Test Tube Darkly: Artificial Insemination and The Law*, 67 MICH. L. REV. 127 (1968); Wadlington, *Artificial Insemination: The Dangers of A Poorly Kept Secret*, 64 NW. U.L. REV. 777 (1970).

to custody of a resulting child.[55] Alternatively, the spouse of the biological father could be nominated as the legal mother of any resulting live birth.

If reproductive freedom is the basis for surrogate gestation contracts, such contracts could also provide the opportunity to have children to nontraditional parents. Single persons, homosexual couples, and others who wish to have children might use surrogate gestation to acquire a child not available through their own relationships.[56] Furthermore, complete reproductive freedom would seem to require that surrogate gestation would not necessarily be limited to infertile women.[57] Persons who choose not to have a child because of genetic incompatibility with a partner might choose surrogate gestation as an alternative to the risk of a defective child. Some women might decide for other personal reasons to shift the task of child-bearing to other women.

The major argument against surrogate gestation is that the practce commercializes the birth of children. A longstanding, widespread public policy prohibits the payment of money in connection with adoption.[58] The prohibition reflects the state's *parens patriae* interest in minor children. That interest would be thwarted if a contractual agreement could replace a best interest determination. Other arguments against surrogate gestation derive from its impact upon women. Bearing children for monetary reward could mean encouragement

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55. This solution would preserve the surrogate's rights under Roe v. Wade, 410 U.S. 113 (1973).

56. In a report on *in vitro* fertilization and embryo transfer, the Ethics Advisory Board for the Department of Health, Education and Welfare has suggested that an unmarried woman who wished to use *in vitro* fertilization followed by embryo transfer to a surrogate in order to avoid the inconvenience of pregnancy would have neither marital privacy rights nor procreative capacity in the normal sense to protect. U.S. DEP'T HEALTH, EDUCATION, AND WELFARE, PROTECTION OF HUMAN SUBJECTS: HEW SUPPORT OF HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER: REPORT OF THE ETHICS ADVISORY BOARD, 44 Fed. Reg. 35,033, 35,048 (1979). The Supreme Court in protecting privacy rights indicated, however, that unmarried persons enjoy the same right of choice as do married couples. Eisenstadt v. Baird, 405 U.S. 438 (1972). Additionally, to suggest that only natural procreative capacities are constitutionally protected begs the question. Indeed, in a surrogate gestation contract the prospective adoptive mother has no natural procreative capacity. Both the prospective adoptive father and the surrogate, however, do possess such capacity. The real issue is the individual's right to form the relationship. Futhermore, the rights are interdependent because they do arise out of a relationship.

57. *But see* REPORT OF THE ETHICS ADVISORY BOARD, *supra* note 56, at 35,049.

58. *See supra* note 28.

for women to sell their childbearing capacity.

Like other alternative methods of conceiving and bearing children, surrogate gestation is a new practice for which little or no empirical data exists. So few surrogate gestation contracts have been publicly acknowledged that it is impossible to judge the future effects of the practice. In the interim, however, courts and legislatures may be called upon to decide whether the use of surrogate gestation contracts may be prohibited or regulated by a state. In those instances, the contracting parties will probably assert a constitutional right of privacy based on the Supreme Court's past rulings on procreational choice.

IV. Privacy Rights and Procreational Decisions

Over the past twenty years the Supreme Court has consistently upheld the notion that decisions relating to matters of personal privacy are protected from unwarranted governmental intrusion. During this period, the Court has touched upon both the range of protected decisions within the zone of privacy and the classes of persons entitled to make those decisions. One such decision clearly lies at the heart of that protected zone: the individual decision whether to bear or beget a child.[59] Most of the Court's opinions in this area have been decided in the context of contraception and abortion.[60] As a result of individual challenges to state laws regulating the use and sale of contraceptives, states may neither bar the use of contraceptives nor require distribution only by particular sources.[61] As to abortion, a state may intervene only under limited circumstances, and it may not permit other persons to exercise a unilateral veto over the abortion decision.[62] Both classes of cases establish an area within which individual choices to limit childbirth may not be superseded absent a

59. Carey v. Population Servs. Int., 431 U.S. 678 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

60. Bellotti v. Baird, 443 U.S. 622 (1979) (abortion); Carey v. Population Servs. Int. 431 U.S. 678 (1977) (contraception); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976) (abortion); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Doe v. Bolton, 410 U.S. 179 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Conn., 381 U.S. 479 (1965) (contraception).

61. Carey v. Population Servs. Int., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1977); Griswold v. Conn., 381 U.S. 479 (1969).

62. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1977); Roe v. Wade, 410 U.S. 113 (1973).

compelling and narrowly focused state interest.

The focus of the Court's protection is choice rather than any particular act, so individual freedom in this area cannot be limited to a right not to procreate. The right to make a choice clearly involves a right to decide in either manner—to have a child as well as not to have a child. The Court's most recent cases contain language which reflects such an understanding of choice. For example, in *Carey v. Population Services International*,[63] the Court characterized the decision of "whether to accomplish or prevent conception" as falling within the very center of constitutional protection.[64] Thus, the claim that state regulations which prevent surrogate gestation contracts impinge upon protected individual freedoms cannot be superficially dismissed by an argument that the Court has established only a right not to procreate. On the other hand, the mere fact that surrogate gestation contracts involve matters of procreational choice does not mean that participants in such contracts assert a privacy claim identical to that available for contraception or abortion decisions.[65]

A description of procreational rights as basic, fundamental rights does little to explain why choices regarding those rights have been protected. In order to determine whether privacy claims related to the use of contraceptives, abortion, or surrogate gestation are similar the individual interest in making each choice must be identified. For both contraceptive use and abortion the examination of the interests at stake must begin with the Court's past opinions. If the contraception and abortion opinions are placed in their historical and social context, they demonstrate that the Court's perception of the interest protected by freedom of choice has undergone significant change. This article argues that the change is, at least in part, reflective of the changing social status of women.

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63. 431 U.S. 678 (1977).

64. *Id.* at 685.

65. This is merely another way of saying that the interests sought to be protected in the surrogate gestation contract may not be the same as those identified in the abortion and contraception cases. *Cf.* B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAW (1963). Identifying the purpose for which the Court protects a particular choice is, however, only half of the question. The second half is whether choice can be protected for some purposes but not others. *See* text accompanying notes 119 & 120 *infra*.

A. *The Changing Role of Women in America*

The Court decided the contraception and abortion cases during a period of radical change for American women. These cases span a thirty-year period from 1943 when the Court dismissed the appeal in *Tileston v. Ullman*[66] to 1973 when it decided *Roe v. Wade*.[67] Those same thirty years witnessed remarkable changes in the social roles and expectations of women. One measure of that change was women's employment outside of the home. Between 1900 and 1940 women accounted for approximately 25% of the work force[68] and were generally young, single, and poor.[69] By 1970 nearly one-half of all women over sixteen were in the labor force.[70] Furthermore, these post-1940 working women exhibited a very different social profile from their pre-1940 sisters, namely, they were older, married, and mothers.[71] Obviously, the large-scale entry of these women with children into the labor market signified that women were no longer occupying the traditionally exclusive social role of wife and mother.[72] Patterns of family behavior also responded to this shift as men began to assume more responsibility for children and domestic tasks.[73]

This change in the social role of women paralleled the Court's movement toward the recognition of an individual interest in women who wished to avoid childbirth. In contrast to its early protection of rights to family continuation,[74] the Court had, by 1973, not only recognized that individual inter-

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66. 318 U.S. 44 (1943).

67. 410 U.S. 113 (1973).

68. W. CHAFE, *Looking Backward in Order to Look Forward: Women, Work and Social Values in America* in WOMEN AND THE AMERICAN ECONOMY 12 (1979).

69. *Id.*

70. *Id.*

71. *Id.* The percentage of unmarried women working remained relatively constant during the thirty-year period while the percentage of married women workers tripled. *Id.* A better indication of changing social roles is the entry into the labor force of women with small children. Between 1959 and 1974 the employment rate for mothers with children under three doubled. *Id.* at 25.

72. Some courts, however, refuse to recognize this change. *See* J.B. v. A.B., 242 S.E.2d 248 (W. Va. App. 1978) (maternal responsibility for children continues to reflect division of labor in the average family).

73. *See generally,* Hayghe, *Families and the rise of working wives—an overview,* MONTHLY LAB REV., May 1976, at 12; Hedges and Barnett, *Working Women and the Division of Household Tasks,* MONTHLY LAB. REV., April 1972 at 9; Lipman-Blueman, *Role De-Differentiation as a System Response to Crises: Occupational and Political Roles of Women,* 43 Soc. INQUIRY 105 (1973).

74. Skinner v. Oklahoma, 316 U.S. 535 (1943).

ests would not be fully protected by protection of married couples,[75] but also had conceded that women's particularized interests in avoiding childbirth deserved protection.[76] In part, this recognition was a reflection of the fact that women already had achieved a large measure of social independence. Even more importantly, the Court implicitly recognized that women are affected differently and more drastically than men by the unavailability of choice with regard to childbirth.

B. *Male-centered Concerns:* Skinner *and* Griswold

Long before the Supreme Court decided *Griswold v. Connecticut*,[77] it had held that individuals have certain basic rights with regard to procreation. A striking difference is apparent, however, in the right of choice as it has developed in the Supreme Court's later decisions and its original enunciation by Mr. Justice Douglas in *Skinner v. Oklahoma*[78] and *Griswold*.[79] Both cases were concerned with the impact of state intrusion upon procreational choice. The protective structure espoused by these decisions, however, related to the preservation of a system of patriarchal family structure[80] and authority. Neither emphasized the particular impact upon women and children of the unavailability of choice.

In *Skinner*, when Justice Douglas stressed that sterlization legislation involves one of the basic civil rights of man

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75. *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965), *with* Eisenstadt v. Baird, 405 U.S. 438 (1972).

76. Roe v. Wade, 410 U.S. 113 (1973).

77. 381 U.S. 479 (1965).

78. 316 U.S. 535 (1942).

79. 381 U.S. 479 (1965).

80. A patriarchal family structure is one in which both individual families and society as a whole are dominated by male authority. *See generally Woman, Culture and Society—A Theoretical Overview in* WOMAN, CULTURE AND SOCIETY 17-42 (M. Rosalidz & Lamphere eds. 1974). The search for an explanation of male social domination and consequent female subordination is not a new task. Some theorists have posited that male domination is biologically based. That is, physical strength, the needs of a hunting culture and the weakening effect of pregnancy upon women are historically responsible for male dominance. *See generally* C. LEVI-STRAUSS, THE FAMILY IN MAN, CULTURE AND SOCIETY 261 (Shapiro ed. 1956); L. TIGER, MEN IN GROUPS (1968). Others have argued that women originally dominated men. *See generally* J. BACOFEN, THE MOTHERS (1861); R. BRIFFAULT, THE MOTHERS (1927); A. RICH, OF WOMAN BORN (1978). Whatever the origins of male authority, male dominance is a clearly reflected feature of western society. Moreover, that domination is supported, not only by family structure, but by other social and political institutions such as illegitimacy. *See* text accompanying notes 96-108 *infra*.

because "procreation [is] fundamental to the very existence and survival of the race"[81] he was referring literally to men because *Skinner* is a decision about men's rights. For males, having children does not involve the actual experience of pregnancy nor has it traditionally involved the close relationship that women experience with infants and small children.[82] Rather, men's general procreative concerns have related primarily to the continuation of family lines,[83] and that area of male concern clearly fuels *Skinner*.[84]

In *Griswold v. Connecticut*[85] Justice Douglas continued the *Skinner* theme of freedom from government intervention. In his famous penumbras and emanations essay,[86] he introduced the notion of marital privacy. Although the Constitution itself does not mention marriage as a fundamental right,

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81. 316 U.S. at 541.

82. For a discussion of importance of role differentiation, *see* text accompanying note 107 *infra*.

83. *See generally* C. ANDREAS, SEX AND CASTE IN AMERICA (1971); K. MILLET, SEXUAL POLITICS (1969); Freeman, *The Legal Basis of the Sexual Caste System*, 5 VA. U.L. REV. 203 (1971); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55; Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection and the Uniform Parentage Act*, 23 KAN. L. REV. 23 (1974). Identification of this generalized concern does not mean that males are never concerned for their individual relationships with their children. The concerns noted here are those reenforced by the social system—not those that prevail in individual families. Data from social and anthropological studies indicates that Western society has traditionally afforded great weight to male interests in the continuation and identification of family lines. The strength of that interest can best be demonstrated by the fact that this is the interest which has received legal protection.

84. Perhaps the most visible evidence of the male interest in the continuation of family lines is the naming process. Families in Western civilization use male surnames. Linguists have shown that the naming process is central to both the self-concept of the individual and to the allocation of power among individuals. C. MILLER & K. SWIFT, WORDS AND WOMEN 1, 9 (1976). Additional evidence of the importance of the right to control names can be found in litigation challenging a state's right to require the use of husbands' surnames by married women. Although courts have trivialized women's claims in this matter, the very need to interdict women's rights is demonstrative of the power balance involved. *See* Whitlow v. Hodges, 539 F.2d 582 (6th Cir. 1976), *cert. denied*, 427 U.S. 1029 (1976); Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972). *See also* Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO ST. L.J. 546 (1974). In addition to the evidence presented by the naming process, historians have long recognized the connection between the devolution of private property and interests in the perpetuation of a patriarchal family system. *See e.g.*, F. ENGELS, THE ORIGINS OF THE FAMILY (4th ed. 1942).

85. 381 U.S. 479 (1965).

86. *Id.* at 483.

the Bill of Rights' various guarantees create a zone of personal privacy surrounding the marital relationship.[87] The state cannot prohibit married persons' use of contraceptive devices because that prohibition would have a maximum destructive impact upon the marital relationship.[88]

A state rule prohibiting the use of contraceptives could potentially destroy the marriage relatioship in at least two ways: the economic hardship caused by unplanned children and the emotional complexity introduced into the relationship by the presence of children who demand attention and nurture. *Griswold,* however, did not discuss either of these areas; instead, Justice Douglas focused on the example of state invasion into the marital bedroom.[89] Drastic as this example may have seemed, it clearly illustrated his point: a man's home is his castle, and *Griswold* protects all persons concerned by protecting that dominion.

Griswold is based upon the assumptions that marriage is a unity of two persons and that family decisions should not be subject to state intervention. The notion, however, that marriage creates an independent unity has an historical meaning that cannot be ignored. Historically, at common law the husband and the wife were regarded as one and the husband was the one.[90] Thus, although any right extended to marriage was assumed to be enjoyed by both parties, as a practical matter protection of the family unit did nothing to identify or explore women's critical individual interest in childbirth.[91]

Although both *Skinner* and *Griswold* afford constitutional protection to the private decision of whether or not to bear children, the freedom they promote is not freedom for individuals, but freedom only for families. Concern for equality within the marital relationship or with the impact of unwanted pregnancy upon the relationship of mothers and children had yet to develop.

C. Eisenstadt, Roe, *and Women's Rights.*

In the early seventies the Court's opinions on contracep-

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87. *Id.* at 483-85.
88. *Id.* at 485-86.
89. *Id.*
90. 1 W. BLACKSTONE, COMMENTARIES 442-45 (1765).
91. For a discussion of the way in which protection for family units promotes female dependency, *see* text accompanying notes 96-99 *infra.*

tion took an important turn. In *Eisenstadt v. Baird*[92] the Court held that the state of Massachusetts could not prevent the distribution of contraceptives to unmarried persons. In refusing to base its opinion on the ground that Massachusetts could not adhere to a moral viewpoint which punished extramarital sex,[93] the Court adopted a new view of the relationship it had protected in *Griswold*. *Eisenstadt* recognized that the marital relationship was not a unity, but rather an association of two emotionally and intellectually distinct individuals.[94] Thus, the right of personal privacy belonged to individuals, rather than to the marital unit, and it extended to all adults regardless of their marital status.[95]

The recognition that individual decisions concerning childbirth were protected was a turning point for women's status. *Eisenstadt* is the first case in which the Court acknowledged the uniqueness of women's interests in the contraception decision. At least two interests related to that decision are unique to women. First, and most obvious, is the reality that the physical consequences of conception differ for men and women. Only women become pregnant. Women, therefore, have a particular interest in childbearing, which is related to their physical involvement in pregnancy. Second, and less apparent, is the unique interest that women have in avoiding the discrimination related to pregnancy outside of marriage. Pregnancy outside of marriage subjected women to the stigma associated with illegitimacy. Giving women the choice to use contraceptives to prevent pregnancy out of wedlock permitted women to avoid that unfair stigma.

The stigma rising from illegitimacy was unfair to women because they were penalized more severely than males for committing the same act. Illegitimacy had historically been used to assure that wealth and authority would pass only to the true biological heirs of males who controlled the devolving assets. The institution thus served a social need to identify men's children. It was extremely important that a child belonged to an identified father in a culture that made inheritance and other economic benefits turn on the father-child connection. Because paternity, however, is not marked by any

92. 405 U.S. 438 (1972).
93. *Id.* at 451.
94. 405 U.S. at 453.
95. *Id.*

physical distinction, identifying a child's father was significantly more difficult. Requiring a woman to attach herself to one male provided assurance to that male that he was the father of any child borne by that woman.[96]

Illegitimacy not only permitted men to assure themselves of legitimate children, but also protected them against the claims of those children whom they did not wish to legitimate.[97] That assurance guaranteed that when males had sexual access to women outside of marriage, they would not be penalized for their acts.[98] The consequences, then, of having children out of wedlock were very different for men and women. Women had a special individual interest in not bearing a child under circumstances in which they would receive a different penalty from that received by men for the same activity. That individual interest lies at the very heart of the notion of invidious discrimination. The Court in *Eisenstadt* implicitly recognized that women and their illegitimate offspring suffer such discrimination.[99] Giving unmarried women legal access to contraceptives permitted them to avoid an unfair social penalty by preventing the birth of an illegitimate child. The Court was thus able to advance women's interest in equal treatment by affording them the means to protect themselves.

In the abortion cases,[100] the Court continued to recognize women's unique interest in determining whether to bear a child. Despite the difficult issues raised by the presence of po-

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96. *See* F. ENGLES, *supra* note 84.

97. Interestingly none of the Supreme Court's cases on illegitimacy have included any factual issue of paternity. In every instance no allegation was made that the putative father was not the biological father of the child.

98. Women, however, would be threatened for themselves and for their children. Wallach & Tenoso, *supra* note 83.

99. The Court's unwillingness to strike down state statutes distinguishing the inheritance rights of illegitimates from those of legitimate children does not mean that *Eisenstadt* is not supported by the discriminatory impact of illegitimacy. When the Court deals with illegitimacy and property it is less likely to find that the state scheme is discriminatory because to do so would require the Court to dismantle an integral part of the property expectations underlying patriarchy. *See* Lalli v. Lalli, 439 U.S. 259 (1978). Giving an individual the power to opt out of a system that discriminates against him is one thing. To ask the Court to dismantle a property system is a request that it destroy a system of which it is an integral part. Thus, the Court is more comfortable eliminating illegitimacy's discrimination when it does not offend the property system. *Cf.* Karst, *supra* note 23, at 676-82.

100. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

tential human life, the Court in *Roe v. Wade*[101] steadfastly held to a rule allowing women the choice to terminate a pregnancy in its early stages.[102] In allocating that choice, the Court spoke of the detriment[103] to women of a state's refusal to permit abortion. One possible meaning of the Court's use of the word "detriment" is related to women's physical involvement with childbearing.[104] As pregnancy occurs inside a woman's body, she has a special interest in its physical impact upon her. The physical and psychological effects[105] of pregnancy, however, are not the sole support of the Court's decision in *Roe*. The opinion does not require that women demonstrate either physical or psychological harm prior to determining that they wish to have an abortion. Indeed, because the rules in *Roe* and subsequent cases[106] extend this option to women as a class, they must be based upon effects more general than either physical or psychological harm. The most generalized effect of an unterminated pregnancy is that a woman becomes a mother. Therefore, the physical condition of pregnancy, by itself, does not require that women be permitted to determine whether to bear a child. Rather, an aspect of motherhood gives women the choice.[107]

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101. 410 U.S. at 160.

102. *Id.* at 154.

103. *Id.* at 153.

104. *Id.*

105. *Id.*

106. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976).

107. *See generally* Chodorow, *Family Structure and Feminine Personality*, in WOMAN, CULTURE AND SOCIETY 43 (M. Rosaldo and L. Lamphere ed., 1974); Chodorow, *Being and Doing: A Cross-Cultural Examination of the Socialization of Males and Females*, in WOMEN IN SEXIST SOCIETY (V. Gornick & B. Moran ed., 1971). Although both men and women become parents of a child born to them, for women this relationship has traditionally had a significantly different impact. A culture might exist in which the person who gives physical birth to a child is not necessarily the individual responsible for its care or at least shares that responsibility with other family members. Outside of breastfeeding newborn infants, such a child care role can clearly be performed by members of either sex. Yet this hypothetical division of gender-neutral roles does not reflect traditional cultural values, placing upon mothers almost total responsibility for child care. The cultural role definition of motherhood has not only placed women in charge of children, but it has also barred them from other roles. Employers consistently refused to hire women with pre-school age children but did not use the same hiring policy for males. The Supreme Court finally declared such action illegal unless the employer could demonstrate that the existence of conflicting family obligations is a bona fide occupational qualification. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). For equal protection purposes, however, distinctions based upon pregnancy are not *per se* sex discrimination. Gelduldig v.

Of course, no culture has the option of shifting to men the functions of pregnancy, childbirth, and breastfeeding; but outside of these functions and absent directive socialization, nothing inherent about women makes them better able to care for children than males. To assign women to a social role based on improbably generalized characteristics is particularly onerous because that assignment is tied to discrimination against them.

The allocation to a woman of those basic roles with which her physical attributes initially connect her guarantees that the culture will continue to have the child-bearing child care function fulfilled. The function will be fulfilled, however, at the cost of restricting women's other roles. To give women the choice not to become mothers is to allow them to assert themselves against a system which discriminates against them. As the Court in *Eisenstadt* struck at illegitimacy without dissolving the social system, in *Roe* it acknowledged that motherhood serves as a basis for discrimination against women without dismantling the motherhood role.[108] The contraception and abortion cases thus strike a close balance between women's right to personal autonomy and protection of the existing cultural role. Women's claims to personal privacy in the abortion and contraception cases relate, not only to their claims to be free from physical and emotional detriments caused by unwanted pregnancy, but also to an additional, yet unarticulated, claim that choice in matters of childbearing is directly connected to discrimination against women. Understanding that connection gives added weight to the meaning of detriment in *Roe*. The choice to have an abortion, like the choice to practice contraception, is fundamental to women because their ability to bear children has been used by a male-dominated system to subordinate them. Even if the Court were to explicitly recognize the connection between choices on childbearing and women's secondary social status, it cannot give women complete autonomy either by destroying illegitimacy or by creating a rule that permits women to control childbearing without making a significant attack on the social system of which it is a product. The choice rule, on the other

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Aiello, 417 U.S. 484 (1974).

108. Indeed, affording women the choice not to become mothers offers protection for the role's traditional content. That is, if women need not become mothers except upon their own terms, pressure to change the mother's role is lessened.

hand, permits the Court to recognize the detriment without invading the traditional social role of motherhood in any way. As in *Eisenstadt* which, left the Court free to continue to recognize differences between legitimate and illegitimate children in other contexts, so *Roe* leaves the Court free to recognize state interests in protection of the traditional familial relationships in other areas.[109] Any application of the privacy claims originating in *Eisenstadt* and *Roe* to surrogate gestation contracts must take account of this developmental pattern of the Court's decisions. Those decisions have moved toward significant autonomy for women through protection of their choice not to bear children.

D. *Surrogate Gestation and Privacy Rights.*

Parties to surrogate gestation contracts have asserted that their rights are constitutionally protected because surrogate gestation, like contraception and abortion, involves procreational choice. Whether surrogate gestation does, in fact, fall within a protected zone of privacy may depend upon the similarities of the choices involved in the contract to the choices involved in other protected procreational situations. Even if the surrogate gestation choice does lie within a protected zone, procreational rights have never been declared absolute.[110] Thus, a state might retain some interest in regulating surrogate gestation contracts even if the right to enter into such contracts could not be entirely barred.

An initial argument against constitutional protection for surrogate gestation arises from the evolution of the contraception and abortion cases.[111] The choice involved in those cases can be characterized as fundamental because it enables women to avoid the effects of past, unfair treatment.[112] In contrast, none of the participants in a surrogate gestation contract asserts an exactly similar right. The biological father of the child cannot claim a right analogous to that protected by *Eisenstadt* or *Roe*.[113] Fathers have never been the object of a

109. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

110. Roe v. Wade, 410 U.S. at 162-65.

111. *See* text accompanying notes 73-109 *supra.*

112. *See* text accompanying notes 107-09 *supra.*

113. The biological father's constitutional claim is more likely to be respected if it can be grounded in the relationship with the potential child rather than upon the

discrimination comparable to illegitimacy[114] nor have they suffered from subordination connected with their paternal role. Indeed, the assertion of a right to enter into a surrogate gestation contract reinvents something of the same system disestablished by the Court's abortion cases. Male rights to legitimate children born outside of the marriage or to refuse to do so are inextricably intertwined with a detriment to women. When a man enters into a surrogate gestation contract, he reasserts principles similar to those supporting illegitimacy. Not only does he claim a child biologically connected to him, but he claims a right to control the legitimation of that relationship through the application of a free market theory.[115]

The surrogate gestator's rights come closer to fitting a broad characterization of the rights protected by *Eisenstadt* and *Roe*. If *Eisenstadt* and *Roe* are viewed as protecting any choice,[116] then the surrogate's choice might be protected even though it does not arise from the theoretical basis supporting women's rights in those cases. On the other hand, a narrower reading of women's contraception and abortion rights would produce a different result. If the purpose of the contraception and abortion cases is closely tied to eradicating the effects of a system that uses women's childbearing ability to unfairly subordinate them, then the surrogate gestator's choice would not deserve protection. The surrogate gestator is not attempting to avoid the detriment of pregnancy or the stigma of an illegitimate child. Even in a contract in which she is not paid, her choice allows her more than a right to choose a traditional social role. Thus, the polarity of the choices involved might lead one to conclude that surrogate gestation is not constitutionally protected because it is radically opposed to the choice afforded in the contraception and abortion decisions.

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father's relation to the surrogate. The father's relation to the surrogate is not an intimate physical relationship. Nor is it an emotional attachment that is likely to flourish into a protectable relationship. *See* Karst, *supra* note 23. Indeed, the father-surrogate relationship may look too much like unmarried cohabitation to receive significant protection. *See* Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978).

114. *See* text accompanying notes 91-99 *supra*.

115. *See* F. ENGELS, *supra* note 84; J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 31 (1973).

116. *Cf.* Braverman, Flannery, Lipsett & Weisman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295 (1979) (suggesting that protection of choice may not be extended to some methods of artificial conception).

A position, however, that would deny all constitutional protection to surrogate gestation because of the historical content of the choice involved is too extreme. First, such a position ignores the Court's repeated emphasis that it protects a decision.[117] Characterization of a right as a decisional one implies that protection is not connected to the decision's content. A choice to decide only for an option deemed fit by the Court or any other group is hardly a real choice. Second, to protect the abortion choice but not the surrogate gestation choice runs afoul of the abjuration that the due process clause should not be a vehicle for preferring new social values over old ones.[118] As long as the crux of the *Roe* decision is the protection of choice, such preferences are avoided. While admitting the reality of a social system in which the mother-child relationship leads to discrimination against women, the choice principle is neutral because it selects neither the values inherent in that system nor those associated with any alternative.[119] At the same time that the principle of choice recognizes individual women's claims that motherhood would be a detriment to them, it neither inhibits entrance into the motherhood role nor attempts to define that role's content.[120] Comparison of the choice involved in contraception or abortion

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117. Carey v. Population Serv. Int., 431 U.S. at 685.

118. This aspect of *Roe* has caused the most cogent criticism of the case. *See* Ely, *The Wages of Crying Wolf: A Comment of* Roe v. Wade, 82 YALE L.J. 920 (1973).

119. The choice principle has a way of bringing those of us who support the right to an abortion full circle. To continue to insist upon the abortion choice but deny the surrogate gestator's choice, one must show why abortion should be protected while surrogate gestation should not. The thrust of this article is that the difference between the result of the two choices is crucial for women as a class. The ability to choose an abortion means that women can control their biological capacity to bear children. If they control that capacity, it cannot be used to punish or to subordinate them. Surrogate gestation, on the other hand, surrenders that control for a contractual promise. The temptation in the face of such a disturbing choice is to cry wolf once again. Women ought to be cautious about asking the Court to protect them from poor choices. In the past that has led to decisions that isolated them in their domestic roles. *See* Mueller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. 130 (1872).

120. The questions involved in *Roe* and in the instance of surrogate gestation are more than those of whether being a mother is good or bad. At bottom, the issue is whether being female can continue to be a ground for restriction and differentiation. Because the primary basis for such restriction and differentiation has been women's childbearing capacity, rules vesting control over that capacity are a place to begin. When women control the differentiating factor, they have some protection from senseless differentiation.

and surrogate gestation need not necessarily result in a position denying surrogate gestation all constitutional protection. The comparison has value, however, because it demonstrates the importance of state neutrality in procreational matters.

V. State Regulation of Surrogate Gestation

State neutrality toward surrogate gestation contracts requires more than the absence of legislation prohibiting such contracts. In the context of abortion, the state can neither prohibit certain abortions nor require them. The state may not support the values of those women who believe that the mother-child relationship is a detriment, nor may it support the values of those women who believe it is sacrosanct. The same neutral attitude should be maintained toward surrogate gestation: the state should neither prohibit surrogate gestation contracts, nor enforce such contracts. If the state enforces surrogate gestation contracts through any rule similar in result to specific performance, it is in the position of supporting the propriety of a particular social role for women. Such support is impermissible because it is the enforcement of a value judgment that women's procreative ability may be properly used to satisfy the needs of other persons.[121] Likewise, if the state forbids surrogate gestation contracts, it places itself in the position of denying women the right to choose a social role. In either case, the neutral choice rule is violated.

When a state is faced with a surrogate gestator unwilling to transfer the child to the biological father and his spouse, it should treat the child's biological parents exactly as other biological parents are treated. It should assume that the parent-child relationship is of fundamental importance[122] and that a compelling state interest is necessary to terminate that relationship with regard to either parent.[123] Thus, as between the two parents, the state should initially remain neutral by pro-

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121. To deny that the Court makes value judgments even in this sensititve area would be foolish. What the Court seems to have done is to subordinate the values on either side to the higher value of choice.

122. Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977); May v. Anderson, 345 U.S. 528, 534 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

123. Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

tecting both the biological parents' relationship to the child.

Surrogate gestators should not, as a class, have fewer constitutional rights than other women. If the biological mother determines that she does not wish to carry the pregnancy to term, she must be permitted that unilateral decision.[124] If the biological father cannot interpose his wishes upon that decision by his own spouse, he should not be able to prohibit the decision by the surrogate. If the biological mother does carry the pregnancy to term but refuses to surrender the child under the contract, the breach should be treated as a custody dispute. The issues of custody and visitation should be decided under the same standards generally applicable to child custody cases.[125] In most states the standard will be the best interest of the child. Of course, difficult questions will arise in those cases in which the biological father and his spouse are using a surrogate gestation contract to acquire their first child from a surrogate who has other children. In those instances, a court will have some evidence of the surrogate's interaction with her other children but will have no objective measure of the biological father's parental capabilities. Expanding evidence of pre-birth bonding between mothers and children may point toward some preference for maternal custody in this unique situation.[126] Courts, however, should be careful to confine the basis for their custody decisions to psychological evidence generally used in custody cases. They should not use the unique circumstances of the child's birth as a weapon against either parent.

A state's refusal to enforce the contract against the surrogate must be parallelled by its refusal to enforce the contract for her. Thus, she should not be entitled to use the courts to collect any contractual fee. That resolution does not demand abrogation of the child's support rights.[127] If the biological father refuses to take the child, the surrogate gestator should be able to enforce a support claim against him on the child's behalf. In most states the presumption that a child conceived during a marriage is the child of a surrogate's spouse is a rebuttable presumption.[128] The surrogate, acting on behalf of

124. Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976).
125. *See supra* notes 45-48.
126. *Cf.* Rossi, *A Biosocial Perspective on Parenting*, 106 DAEDALUS 1 (1977).
127. *See supra* note 49.
128. *See supra* note 11.

the child, should be given an opportunity to establish the factual parentage of the child involved in order to enforce the support claim.

State neutrality with regard to abortion decisions is not absolute. After the first trimester of pregnancy, the state's right to regulate abortion becomes more substantial.[129] The ability to impose additional regulations is based upon the state interest in maternal health and potential human life.[130] Similarly, absolute state neutrality should not be required in surrogate gestation. Such contracts carried to termination produce an existing child whose interests must be taken into account. A requirement of initial neutrality toward the choice to enter into the contract does not prohibit all state regulation, particularly if the regulations are carefully drawn to protect the interests of the children involved.[131]

A number of states currently prohibit the sale of children.[132] In one state, a court confronted with a surrogate gestation contract analogized the contract to a sale because of concern over commercializing the birth of children.[133] A state's interest in preventing the actual sale of children is an important one. Nevertheless, the transfer of a child in which the recipient parent has a biological relationship to the child should not be regarded as a sale. The reason for prohibiting the sale of children is a judgment that the amount of money unrelated individuals can pay bears no relationship to their ability to fulfill children's emotional and psychological needs. Transfers to related persons or between them, however, are treated differently.[134] In those cases, the biological relationship is assumed to protect the child's best interest. The state's interest in protection of the child can be satisfied by preventing its transfer under the contract to anyone other than the

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129. Roe v. Wade, 410 U.S. 113, 163 (1973).

130. *Id.*

131. Zablocki v. Redhail, 434 U.S. 374 (1978) (not all state regulation impinging upon rights of fundamental importance is barred).

132. *See, e.g.*, FLA. STAT. ANN. § 63.212(1)(b) (West Supp. 1981); IDAHO CODE § 18-1511 (Supp. 1981); KAN. REV. STAT. § 65-509 (1919); N.J. REV. STAT. ANN. § 9:3-54 (West Supp. 1981).

133. Doe v. Kelley, 6 FAM. L. REP. 3011 (BNA) (Feb. 19, 1980).

134. The biological relationship between the child and one parent is a reason for the lack of state interference in step-parent adoptions. *See supra* note 29. Although custody of children on divorce is occasionally awarded to nonparents, parents generally have preference absent a showing of unfitness. H. CLARK, LAW OF DOMESTIC RELATIONS 593 (1968).

biological father and his spouse.[135]

In the abortion cases, the Court also identified a separate state interest in the protection of the mother.[136] Whether a state might use that interest to enact a blanket prohibition upon the payment of a fee to surrogates is a difficult question. Both the abortion funding cases[137] and the Court's decisions on the right to marry[138] indicate the justices' ability, on occasion, to separate a fundamental right and the monetary considerations related to its exercise. Not all state rules that impose a financial barrier to the exercise of a fundamental right are prohibited.[139] For that reason a state might argue that forbidding payment to a surrogate gestator continues to leave the surrogate free to exercise her choice. Such an argument, however, should be rejected. A state has an interest in the protection of the maternal health of women engaging in surrogate gestation contracts. Forbidding the payment of a fee to those women has no effect upon their maternal health. Whether a surrogate mother has a healthy pregnancy depends upon her health prior to pregnancy and upon the kind of health care she receives during pregnancy. Thus, the reason for prohibition of fee payment appears to be to burden the choice to enter the contract. If the state's reason for prohibiting fees is to discourage entrance into the contract, such prohibitions should not be permitted because they allow the state to make a judgment regarding a choice of procreation.

The state's concern for maternal and fetal health[140] also permits it to regulate the facilitators of surrogate gestation contracts. A state might adopt licensing requirements for facilitating agencies similar to those used under adoption statutes.[141] Licensing requirements could properly be used to ensure adequate medical protection for surrogates and children. In a number of states adoption agencies are barred from

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135. The fact of the transfer could give the state the right to scrutinize the proposed adoption in order to determine whether the child was in need of state protection. To prevent a transfer agreed upon by all parties the state should have to demonstrate that the transfer would result in harm to the child involved.

136. Roe v. Wade, 410 U.S. 113, 163 (1973).

137. Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

138. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) *with* Califano v. Jobst, 434 U.S. 47 (1977).

139. Zablocki v. Redhail, 434 U.S. 374 (1978).

140. Roe v. Wade, 410 U.S. 113 (1973).

141. *See supra* note 31.

charging fees for the placement of children,[142] a prohibition intended to prevent the sale of children. Surrogate gestation facilitators, however, are not involved with traditional adoption. The biological connection between the child and the contract participants is some insurance that surrogate gestation will not replace "blackmarket adoption." Thus, prohibition of reasonable fees for facilitators is inappropriate.[143]

VI. CONCLUSION

Surrogate gestation is a new method of providing children to people who either are not able to have children by the traditional method or are unwilling to assume the burdens of pregnancy. The novelty of surrogate gestation contracts presents the courts with many issues that will need to be resolved in the future.

The laws which exist today are inadequate to handle the unique problem of surrogate gestation contracts. Before any legislation can be enacted, however, a determination must be made whether, in fact, the state has a right to regulate, or even prohibit, surrogate gestation. The determination of that right lies in the interpretation of the Supreme Court's past decisions regarding the right to procreational choice.

Initially, the Court held the view that procreation was a matter to be controlled by men, since men had a recognized interest in controlling their family wealth. As the social role of women changed, the Court recognized the possible detriment that pregnancy causes women. Thus, the Court extended the right to procreational choice to women. Surrogate gestation participants, however, do not present the same arguments for a constitutionally protected right to privacy. The contracts cannot be viewed as a remedy for past discrimination or the removal of a detriment. If the past Supreme Court decisions are viewed as protecting *any choice* with regard to procreation, then surrogate gestation contracts should be protected from state prohibition.

While state prohibition of such contracts may be denied, state regulation probably will not. Just as the state may regu-

142. *See supra* note 28.

143. Just as adoption agencies are restricted to fees related to actual expenses involved, facilitators of surrogate gestation contracts might have their own fees restricted.

late abortion under certain circumstances, so should the state have the right to regulate surrogate gestation under similar circumstances. The state should remain neutral in its treatment of the actual surrogate gestation contracts, but should be allowed to intervene under the compelling state interest of protecting the best interest of the child which results from such a contract.